STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2007
v	No. 269880 Oakland Circuit Court
LAWRENCE FRANK COBB, Defendant-Appellant.	LC No. 2005-203780-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempting, preparing, or conspiring to arrange for child sexually abusive activity, MCL 750.145c(2), and using the Internet to communicate with another to commit or attempt to commit child sexually abusive activity, MCL 750.145d(1)(a) and (2)(f). Defendant was sentenced to concurrent terms of two to twenty years for each count. He appeals as of right, and we affirm.

I

Defendant's convictions arise from his communication with James May, a special agent for the Michigan Attorney General's Office, in an Internet adult chat room, while Agent May was conducting an undercover investigation of Internet crimes. The chat room enables a person to engage in an instant messaging conversation with another user of the chat room. A user can also send offline messages, which operate similar to Internet e-mail by allowing a person to send a message to another that is accessible at a later time.

Agent May created a fictitious female profile for use in the chat room, which included such information as hobbies and interests, and then waited for someone to contact him. On June 21, 2005, Agent May was contacted by someone using "python40mich" as a screen name. Agent May viewed python40mich's profile, which indicated that python40mich was a 40-year-old male whose hobby was finding naughty girls to play with. Although Agent May's fictitious profile did not contain an age, he indicated in the chat that he was a 14-year-old girl. Python40mich was sexually explicit in the chat, making various lewd statements to arrange a meeting with Agent May's fictitious persona to engage in sexual acts. Python40mich also inquired whether he was chatting with a police officer and requested an opportunity for a phone conversation before meeting at a shopping mall.

Michigan State Police Detective Rebecca MacArthur posed as Agent May's fictitious persona for purposes of calling the phone number provided by python40mich. Detective MacArthur did not disguise her voice, but tried to sound immature when discussing the planned meeting for the next day. Agent May received an offline message from python40mich on the next day in which python40mich indicated that he could not wait for the meeting. Later that day, Agent May went to the shopping mall where the meeting was scheduled. He recognized defendant from his picture in the chat room profile. After watching defendant in the parking lot, Agent May and other agents arrested defendant.

At trial, defendant presented an abandonment defense to the charge that he attempted to arrange for child sexual abusive activity. Further, defendant testified that he thought that he was meeting an adult at the shopping mall, who had pretended to be a younger girl in the June 21, 2005, chat. He believed that terminology used in the chat was beyond the understanding or expected conversation of a 14-year-old girl, and viewed their chat as a total fantasy. Further, he concluded, based on his brief phone conversation to confirm the meeting, that he was speaking with an adult female. He intended that they would have lunch together when they met.

II

Defendant first claims that he was deprived of the effective assistance of counsel by defense counsel's stipulation to the admission of a transcript of his chat room conversation with Agent May. Defendant asserts that most of the transcript should have been redacted to exclude irrelevant and prejudicial statements. Additionally, he asserts that the court erred in permitting Agent May and the female detective to play the roles of defendant and the alleged minor and read the transcript to the jury.

A defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must overcome the strong presumption that counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Further, defendant must show "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different *and* the attendant proceedings were fundamentally unfair or unreliable." *Rodgers, supra* at 714 (emphasis in original).

Defendant has failed to establish either the deficient performance or the prejudice necessary to succeed on a claim of ineffective assistance of counsel. Although defendant claims that most statements in the chat transcript should have been excluded, his failure to identify the portions that should have been excluded under MRE 401 or MRE 403 alone could preclude relief. An appellant may not leave it to this Court to search for a factual basis to sustain or reject his or her position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). In any event, all evidence offered by the parties is prejudicial to some extent. *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). Evidence is excludable under MRE 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* Under the rule of completeness, the entire transcript of defendant's Internet chat with Agent May had probative value based on the basic premise that "a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 215; 462 NW2d 1 (1990). Indeed, defense

counsel's apparent trial strategy, as evidenced by his request in closing argument that the jury consider the "totality of the chat," was for the jury to receive the entire transcript so that it could evaluate defendant's claim that he believed that he was having a chat with an adult.

Limiting our review to the record, defendant has not overcome the presumption that defense counsel's stipulation to admit the entire transcript was sound trial strategy under the circumstances. A failed strategy does not constitute ineffective assistance of counsel.

Turning to defendant's challenge to the trial court's decision to overrule defense counsel's objection to having the transcript read to the jury, we agree with the prosecutor's argument that this claim does not fall within the ambit of defendant's claim of ineffective assistance of counsel. In general, an issue is not properly preserved for appeal unless it is set forth in the statement of the question presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nonetheless, because this Court is empowered to overlook defendant's failure to properly present this issue for appellate consideration, *Health Care Ass'n Worker's Compensation v Dir of Bureau of Worker's Compensation*, 265 Mich App 236, 243; 694 NW2d 761 (2005), we shall consider defendant's claim that the manner in which the chat was published to the jury created a danger of unfair prejudice.

In general, we review a trial court's evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Before opening statements at trial, defense counsel objected to the chat being read to the jury on the ground that it was not meant to be spoken out loud and having it read to the jury would severely prejudice defendant's position. The trial court ruled that it could be read through a witness. Later, after introducing a transcript of the chat during Agent May's testimony, the prosecutor proposed that Agent May read the part attributed to his fictitious persona and that Detective MacArthur read the part attributable to defendant's screen name, python40mich. Defense counsel replied that he had no objection, but requested that the jury be advised that Detective MacArthur would be testifying as the speaker in the phone conversation with defendant. While Agent May and Detective MacArthur were reading the chat, defense counsel did not raise any objection, other than to object when Agent May briefly interrupted the reading of the chat to explain the meaning of an "ASL" term that he used in the chat. The trial court overruled the objection because Agent May was testifying as a witness.

In general, a party must timely object, stating the specific ground for objection. MRE 103(a)(1). The purpose of an objection is to give the trial court an opportunity to cure the error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). A proper MRE 403 determination can best be "left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000). We agree with defendant's claim on appeal that the inflection of a witness's voice can affect the meaning of written words. See *United States v McMillan*, 508 F2d 101, 106 (CA 8, 1974) (discussing the admissibility of a transcript of tape recordings). Further, the court could have admitted the transcript as an exhibit and permitted the jury to read it. Nevertheless, we find no abuse of discretion in the trial court's decision to overrule the specific objection made at trial to having the transcript of the chat read to the jury. If defendant believed that Agent May and Detective MacArthur were reading the chat with prejudicial inflection, defendant should have timely and specifically objected on this ground. Because defendant did not do so, we conclude that he failed to preserve this issue for appeal. MRE 103(a)(1); see *Canales v State*, 98 SW3d 690, 699 (Tex

App, 2003) (the court found nothing to review where the trial court had overruled a defendant's objection, before a letter was read to the jury, and the defendant did not further object to any unfairly prejudicial inflection when the letter was read). Further, limiting our review to the record, we find no plain error. Therefore, reversal on this ground is not warranted. MRE 103(d); *Jones, supra* at 355.

III

Defendant claims that the trial court erred in denying his request to have the jury instructed on accosting, enticing, or soliciting a child less than 16 years of age, MCL 750.145a, as a necessarily included lesser offense to the principal charge under MCL 750.145c(2). The trial court denied the request on the ground that defendant's defense was that he never believed that Agent May's fictitious persona was under 16 years old. The trial court concluded that there was no evidence to support an instruction on MCL 750.145a. The trial court later added that the requested instruction was improper because the two offenses contain different elements and MCL 750.145a was not necessarily a lesser included offense of MCL 750.145c(2), even if there was evidence to support the instruction.

A lesser offense instruction is only appropriate if the lesser offense is necessarily included in the greater offense. MCL 768.32; *People v Nickens,* 470 Mich 622, 626; 685 NW2d 657 (2004); *People v Cornell,* 466 Mich 335, 357; 646 NW2d 127 (2002). All elements of the lesser offense must be included in the greater offense, and a rational view of the evidence must support the instruction. *Nickens, supra* at 626. Our review of a trial court's ruling on a necessarily included instruction is de novo. *People Walls,* 265 Mich App 642, 644; 697 NW2d 535 (2005).

Both MCL 750.145a and MCL 750.145c(2) can be committed in different ways. As amended by 2002 PA 45, MCL 750.145a provides:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, *or an individual whom he or she believes is a child less than 16 years of age* with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony . . . . . [Emphasis added.]

Although defendant defended against the charge in MCL 750.145c(2) on the ground that he believed that Agent May's fictitious persona was an adult, and offered his own testimony in support of his claim, a rational view of the chat room conversation supports an inference that defendant believed that Agent May's fictitious persona was less than 16 years of age. Defendant's only indicated concern in the chat was that he might be conversing with a police officer. Nonetheless, defendant provided his phone number in the chat and, on the next day, went to the prearranged meeting place at the mall.

In fact, defendant's belief that Agent May's fictitious persona was 14 years old was essential to the prosecutor's claim that defendant violated the provision in MCL 750.145c(2) that

> a person who attempts or prepares or conspires to arrange for . . . any child sexually abusive activity . . . is guilty of a felony. . . if the person knows, has reason to know, or should reasonably be expected to know that the child is a child . . . .

Subject to an affirmative defense for persons emancipated by operation of law, the term "child" means "a person who is less than 18 years of age." MCL 750.145c(1)(b). But the preparation means of committing MCL 750.145c(2) does not require an actual child. If a defendant prepares to arrange for child abusive activity by chatting with and enticing someone who he believes is a child, he may be convicted under the statute. *People v Thousand*, 241 Mich App 102, 115-116; 614 NW2d 674 (2000), rev'd in part on other grounds 465 Mich 149; 631 NW2d 694 (2001).

Upon de novo review, we conclude that a rational view of the evidence supported defendant's requested instruction under MCL 750.145a because, similar to MCL 750.145c(2), the offense does not require that there actually be a minor child victim and, despite defendant's testimony to the contrary, the evidence supported a reasonable inference that defendant believed that Agent May's fictitious persona was 14 years old. Indeed, the prosecutor essentially concedes this point on appeal by arguing that it could have charged defendant under MCL 750.145a based on the facts of this case. The fact that defendant offered a different explanation for his conduct at trial does not support a different result.

The controlling question is whether MCL 750.145a is a necessarily included lesser offense of the charge against defendant under MCL 750.145c(2). To constitute a necessarily included lesser offense, the elements of the lesser offense must be completely subsumed in the greater offense. *Walls, supra* at 645. The greater offense must require the jury to find a disputed factual element that is not part of the lesser offense. *Cornell, supra* at 357.

We reject defendant's claim that the charge against him under MCL 750.145c(2) required proof of a knowledge element not found in MCL 750.145a. The disputed factual element was whether defendant believed that he chatted with a 14-year-old child. This same element would have been required to sustain a charge under MCL 750.145a.

IV

Defendant challenges the trial court's denial of his motion for a new trial, without conducting an evidentiary hearing, based on defendant's claim that a juror was tricked or coerced by other jurors into voting for a guilty verdict. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court may grant a new trial on any ground that would support appellate reversal of a conviction or because it believed that the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

The offer of proof made by defendant in support of his motion consisted of his counsel's representations at the motion hearing. Although defendant's former counsel filed a statement of

the juror labeled "affidavit of witness," the document was not a proper affidavit because it was not confirmed under oath or affirmed before a person having authority to administer such oath or affirmation. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005).

In any event, the trial court did not abuse its discretion by relying on the fact that the jury was polled before being discharged to deny the motion without conducting an evidentiary hearing. The purpose of polling the jury in open court is to determine if each juror consented to the verdict announced by the foreperson. See *Routhier v Detroit*, 338 Mich 449; 61 NW2d 593 (1953). Even if we were to treat defense counsel's representation at the motion hearing and the juror's statement as a proper offer of proof, it was insufficient to demonstrate the type of extrinsic influence or clerical error that would warrant setting aside the jury verdict placed on the record at trial. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997).

V

Defendant next argues that MCL 750.145c(2), as applied in this case, is too vague and overly broad to pass constitutional muster. We review de novo the trial court's denial of defendant's motion to quash the information or reduce the charges on the ground that MCL 750.145(2) is unconstitutionally vague. *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

In general, a defendant may not defend on the basis of a claim that a statute is unconstitutionally vague if his conduct is fairly within the scope of the statute. *Hill*, *supra* at 525. "Statutes are presumed to be constitutional and are so construed unless their unconstitutionality is clearly and readily apparent." *Id.* A statute may be challenged for vagueness on the grounds that it (1) is overbroad and impinges on First Amendment rights, (2) does not provide fair notice of the proscribed conduct, and (3) is so indefinite that it confers unstructured and unlimited discretion on the fact-finder to determine whether the law was violated. *Id.* at 524.

Here, defendant's argument is directed at the requirement of fair notice. Specifically, defendant claims that he might have solicited another individual to engage in private sexual activity, but that nothing was presented at trial that could lead a person of common intelligence to believe that he was violating the statute.

To afford proper notice, a statute must provide a person with ordinary intelligence a reasonable opportunity to know what is prohibited. *Hill*, *supra* at 525. The statutory meaning must be fairly ascertainable from judicial interpretations, the common law, dictionaries, treaties, or the commonly accepted meaning of the words. *Id.* It is plain from the language in MCL 750.145c(2) that it criminalizes a person's attempt or preparation to arrange for child sexually abusive activity. See *People v Adkins*, 272 Mich App 37, 48; 724 NW2d 710 (2006). The statute defines "sexually abusive activity" as "a child engaging in a listed sexual act," and further defines "listed sexual act" to be mean "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h) and (l). Specific definitions of each act are also provided in MCL 750.145c(1), and this Court's interpretation of MCL 750.145c(2) in *Thousand*, *supra* at 115-116, makes it clear that criminal responsibility does not require an actual child victim. A person of ordinary

intelligence would have a reasonable opportunity to know what is prohibited under the statute. Therefore, as applied to the circumstances of this case, the statute is not void for vagueness.

Finally, while defendant suggests that the statute is overly broad and impinges on First Amendment freedoms, defendant has not substantiated his position. In any event, the charge against defendant was predicated on his attempt or preparation to arrange for child sexually abusive activity. The First Amendment does not provide a defendant with the right to attempt to persuade minors to engage in illegal sex acts. *People v Cervi,* 270 Mich App 603, 622; 717 NW2d 356 (2006).

VI

Defendant next challenges the trial court's denial of his motion to quash the information or reduce the charges on the ground that insufficient evidence was presented at the preliminary examination to establish a violation of MCL 750.145c(2). We find it unnecessary to address this claim because any error at the preliminary examination is subject to a harmless error analysis. *People v Hall,* 435 Mich 599; 460 NW2d 520 (1990). "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson,* 469 Mich 1018; 677 NW2d 29 (2004).

VII

Finally, defendant argues that the trial court erred in denying his pretrial motion for an evidentiary hearing on his claim of entrapment. Defendant seeks a remand to the trial court for consideration of his claim.

Because the determination whether a defendant was entrapped is a factual one, a trial court must generally conduct an evidentiary hearing to resolve the issue. *People v D'Angelo,* 401 Mich 167, 178; 257 NW2d 655 (1977). Both the prosecutor and defendant are free to present evidence, which likely will include the defendant's own testimony, to establish a claim of entrapment. *Id.* The burden of proof is on the defendant to establish entrapment by a preponderance of the evidence. *People v Johnson,* 466 Mich 491, 498; 647 NW2d 480 (2002). We review the trial court's findings for clear error. *Id.* A defendant is considered entrapped if "(1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *Id.* Where a law enforcement official does nothing more than present an opportunity to commit a crime, entrapment does not exist. *Id.*

The remedy ordered in *D'Angelo, supra* at 183-184, where the entrapment issue was improperly submitted to a jury, was to remand to the trial court to determine the entrapment issue based on the evidence adduced at trial. *Id.* at 184. In ordering the remand, our Supreme Court considered the trial court's superior opportunity to observe and hear the entrapment witnesses at the trial. *Id.* But a remand is unnecessary when the entrapment issue could be decided as a matter of law based on uncontroverted evidence or by accepting a defendant's trial testimony on the entrapment issue as true. *People v Ramon,* 86 Mich App 113, 117; 272 NW2d 124 (1978).

Here, the record indicates that defendant relied on a transcript of his chat room conversation with Agent May's fictitious persona to support his claim of entrapment. The trial

court found no need for an evidentiary hearing because it could determine from the existing record that defendant was not entrapped. Because defendant did not show any need for a testimonial record to develop his claim of entrapment, the trial court did not err in resolving the entrapment issue without affording the parties an opportunity to present witnesses at an evidentiary hearing.

Further, defendant had an opportunity to testify at trial and, even accepting the testimony as true, it does not aid defendant in establishing that he was entrapped. The record indicates nothing more than that defendant was presented with an opportunity to commit a crime. *Johnson, supra* at 498. Because defendant has not established any area where further factual development could advance his claim that he was entrapped, remand for an evidentiary hearing is not warranted.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray